SHEEHAN
PHINNEY
BASS +
GREEN

PROFESSIONAL
ASSOCIATION

SPBG

ATTORNEYS AT LAW

MANCHESTER
1000 ELM STREET
MANCHESTER, NH
03101
T 603 668-0300
F 603 627-8121

CONCORD
TWO EAGLE SQUARE
CONCORD, NH
03301
T 603 223-2020
F 603 224-8899

HANOVER
2 MAPLE STREET
HANOVER, NH
03755
T 603 643-9070
F 603 643-3679

BOSTON
ONE BOSTON PLACE
BOSTON, MA
02108
T 617 897-5600
F 617 439-9363

WWW.SHEEHAN.COM

Writer's Direct Dial: 603/627-8115
Direct Fax: 603/641-2352
ehaffer@sheehan.com
Admitted in NH and MA

June 8, 2009

HAND DELIVERED

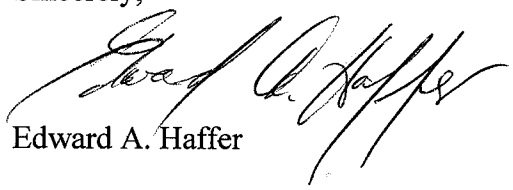
Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Dr.
Concord, NH 03301

Re: Appeal of Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc., Docket No. 2008-0897

Dear Ms. Fox:

Here are an original and eight copies of Reply of Stonyfield Farm, Inc., H & L Instruments, LLC, and Great American Dining, Inc.

Sincerely,



Edward A. Haffer

Enclosures
cc: Service List (attached to Reply)

STATE OF NEW HAMPSHIRE
SUPREME COURT

2008-0897

APPEAL OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND GREAT AMERICAN DINING, INC. UNDER RSA 541:6 FROM ORDER OF PUBLIC UTILITIES COMMISSION

REPLY OF STONYFIELD FARM, INC., H & L INSTRUMENTS, LLC, AND GREAT AMERICAN DINING, INC.

Appellants

Edward A. Haffer
Sheehan Phinney Bass & Green, P.A.
1000 Elm Street
Manchester, NH 03101
(603) 627-8115

June 8, 2009

Mr. Haffer will argue.

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I. THE COMMERCIAL RATEPAYERS HAVE STANDING; AND THEIR CLAIM IS RIPE FOR REVIEW.

PSNH argues (at 12-13 of its Brief) that the Commercial Ratepayers lack standing. This is incorrect. RSA 541 provides that any party to a proceeding or "any person directly affected thereby" may apply for a rehearing (§3), and may thereafter appeal to this Court (§6). As the Commercial Ratepayers said in their Motion for Rehearing to the PUC: "The Commercial Ratepayers have standing to file this Motion. As ratepayers for electricity generated by Public Service of New Hampshire ("PSNH"), the Commercial Ratepayers will be directly affected by the materially increased costs of installation of scrubber technology at Merrimack Station, and by the Commission's Order. RSA 541:3. *Appeal of Richards*, 134 N.H. 148 (1991) [*cert. denied*, 502 U.S. 889(1991)]." App. 154.

In *Richards*, an individual ratepayer and a ratepayer group on behalf of its members alleged that "the rate increases that **will** be imposed upon them as a result of the PUC's approval of the rate plan constitute an 'injury in fact' that gives them standing to bring this appeal." At 156 (emphasis added). On the basis of that allegation of **future** injury, this Court held they had "standing to bring this appeal under RSA 541." At 157. *Accord, Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 203 (2000) (appellant nonprofit corporation representing neighborhood group alleged that operation of a power plant "**would** affect the value of homes" of its members; appellant had standing because the affected members "have suffered or **will** suffer a direct economic injury" (emphasis added)).

Quoting from *Fischer v. State*, 152 N.H. 205, 210 (2005), PSNH also argues (at 12-13) that the Commercial Ratepayers' claim is "not ripe because it 'requires further factual development' and is not 'sufficiently direct and immediate to render the issue appropriate for judicial review at this stage.'" However, for this appeal, no further factual development is

necessary. The PUC ruled that in light of RSA 125-O:11-18 it "lacks authority to make a determination pursuant to RSA 369-B:3-a as to whether this particular modification [of installing scrubber technology] is in the public interest." P. 32 of Opening Brief. The Commercial Ratepayers contend that that ruling was error. That's it. No further facts are necessary.

PSNH also argues (at 13) that the "harm alleged" by the Commercial Ratepayers "will be addressed at a subsequent ratesetting (*i.e.*, factual) proceeding." This misses the point, however. The Commercial Ratepayers contend that they have a right under RSA 369-B:3-a to a determination of public interest **before** the installation takes place.

Finally, PSNH argues (at 13) that the Commercial Ratepayers "have the right and ability to entirely avoid PSNH's 'default service charge' by choosing another supplier for their electric energy …, and therefore can avoid ever paying any costs of the Project." If this argument were valid, PSNH would be able to invoke it again and again in cases brought by ratepayers — effectively telling them "take it or leave it." No such result, however, was intended by the Legislature. To the contrary, the Legislature has expressed concern for ratepayer/customers, and has done so at least twice. One instance is RSA 125-O:11, VI, which provides, "The installation of such technology is in the **public interest** of the citizens of New Hampshire and the **customers of the affected sources**." (Emphasis added.) The other instance is RSA 369-B:3-a, which provides in pertinent part, "Prior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the commission finds that it its in the **public interest** of **retail customers of PSNH** to do so, and provides for the cost recovery of such modification or retirement." (Emphasis added.) In other words, in these two key statutes the Legislature is contemplating that the "public interest" of **those who remain customers of PSNH** must be taken into account.

II. PSNH'S ARGUMENT ON SUBSEQUENT LEGISLATIVE HISTORY IS INVALID.

PSNH contends (at 30) that in the 2009 session the Legislature "rejected Appellants' arguments before this Court and confirmed ... that it did not intend to impose a cap on project costs." The argument is invalid. All of the cases cited by PSNH — *Franklin v. Town of Newport*, 151 NH 508, 512 (2004); *Vector Mktg. v. Dept. of Rev.*, 156 NH 781, 785 (2008); *State v. Gallagher*, 157 NH 421, 425 (2008); and *State v. Njogu*, 156 NH 551, 554 (2007) — involved subsequent **enactments** of legislation (or rules, in *Vector*). Here, however, there was merely the **failure** of a legislative proposal. Nothing was enacted.

When the subsequent history involves an **enactment**, the Court examines it with caution. In *Franklin*, for example, this Court noted a subsequent enactment, saying, "Although **not** controlling, this subsequent history **may** be considered." 151 NH at 512 (emphasis added).

When, however, the subsequent history involves the **failure** of a proposed amendment, this Court and others are loath to impute any significance to it. For example, in *State v. Warren*, 147 NH 567, 572 (2002), this Court rejected the argument that it should be persuaded by the Legislature's failure to adopt a subsequent proposed amendment. In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) the United States Supreme Court did the same, observing, "**Congressional inaction lacks persuasive significance** because several equally tenable inferences may be drawn from such inaction, including the inference that **the existing legislation already incorporated the offered change**." (Emphasis added; internal quotation marks omitted.) Similarly, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169 (2001), the Court said, "**Failed legislative proposals** are a **particularly dangerous ground** on which to rest an interpretation of the statute. **A bill can be proposed for any number of reasons, and it can be rejected for just as many**

others.... [S]ubsequent history is less illuminating than contemporaneous evidence." (Emphasis added; internal citations and quotation marks omitted.)

In *Rice v. CertainTeed Corp.*, 704 N.E.2d 1217, 1220 (Oh. 1999), the Ohio Supreme Court said:

> **A bill may fail for numerous unexpressed reasons that are unrelated to the merit or content of any one proposed revision.** [The Legislature] can **not** express its will by a ***failure*** to legislate. The act of **refusing** to enact a law has utterly **no** legal effect, and thus has **no** place in a serious discussion of law. [The Legislature] **can no more express its will by not legislating than an individual Member can express his will by not voting.** [Boldface added; italics in original; internal citations and quotation marks omitted.]

In *Carter v. California Dept. of Veterans Affairs*, 135 P. 3d 637, 646 (Calif. 2006), the California Supreme Court said: "[A]s we have often explained, **[u]npassed bills**, as evidence of legislative intent, have **little value**.... We also **cannot** ascertain legislative intent from the **failure** of **subsequent** Legislatures to act on adopting the language at issue." (Emphasis added; internal citations and quotation marks omitted.) *See also South 51 Development Corp. v. Vega*, 781 N.E.2d 528, 541 (Ill. App. Ct. 2002) (failed legislation not accepted as evidence of legislative intent).

III. PSNH'S ARGUMENTS ON THE MERITS ARE INCORRECT.

A. No "Unequivocal Mandate" to Install Scrubber Technology

Citing to the Statement of Purpose and Findings of RSA 125-O:11, PSNH contends (at 1) that the Scrubber Law is an "unequivocal mandate" to install the scrubber technology. This is incorrect. Setting aside the fact that a Statement of Purpose and Finding is not itself a "mandate," the language of RSA 125-O:11 contains a significant condition based on costs:

> V. The installation of scrubber technology will not only reduce mercury emissions significantly but will do so without jeopardizing electric reliability and with **reasonable costs to consumers**.
>
> VI. The installation of **such** technology is in the **public interest** of the **citizens** of New Hampshire and the **customers** of the affected sources. [App. 9 (emphasis added).]

As the Commercial Ratepayers said in their Opening Brief (at 11-12):

> "Such" technology means technology with "reasonable costs to customers" — which in turn means costs that "will not exceed 250 million dollars (2013$) or 197 million (2005$)." App. 152. In other words, when the Legislature found in RSA 125-0:11, VI that "The installation of **such** technology is in the public interest" (emphasis added), it was referring to a technology with a cost of **only $250 million** (2013 dollars). It was not referring to technology with **nearly double** that cost — i.e., a cost of **$457 million**. [Emphasis in original.]

Paragraph VIII of §11 reinforces the significance of the cost condition:

> VIII. The mercury reduction **requirements** set forth in this subdivision represent a **careful, thoughtful balancing** of **cost**, benefits, and technological feasibility and therefore the requirements shall be viewed as an integrated strategy of **non-severable components**. [App. 9 (emphasis added).]

That the Legislature in fact engaged in "careful, thoughtful balancing" is undisputed. On this point, the Commercial Ratepayers and PSNH are in full agreement.

Unlike PSNH, however, the Commercial Ratepayers contend that what matters are the **particulars** of this "careful, thoughtful balancing." The particulars of the "cost" component were stated as follows by DES Commissioner Nolin in an April 11, 2006 letter to the Senate Committee on Energy and Economic Development: "Based on data shared by PSNH, the total capital cost for this full redesign will **not exceed 250 million dollars (2013$)** or 197 million (2005$)...." App. 152 (emphasis added). A cost of $457 million obviously and substantially exceeds the "will not exceed" number of $250 million (2013$). It thus clearly throws **out of balance** the result to which the Legislature gave "careful, thoughtful" attention.

PSNH argues, however, (at 19) that by focusing on cost the Commercial Ratepayers are "unraveling" "non-severable components." But if the components are "non-severable," then the scrubber technology cannot be installed without a $250 million ($2013) cost ceiling. What has in fact "unraveled" is the cost component itself. It is no longer even close to what the

Legislature had in mind when it enacted RSA 125-O:11-18. As the Commercial Ratepayers said in their Opening Brief (at 12-13):

> Even PSNH itself has characterized the actual increase as "significant" (App. 40, 48); and the PUC has characterized it as "substantial." P. 31 hereto.
>
> ---
>
> If, nevertheless, a counterargument is advanced to the effect that "such technology" would indeed include a cost as high as $457 million, then that same counterargument could be used to support a cost as high as $1 billion, or even $10 billion. If the Legislature intended no ceiling to costs, so that near-doubling is permissible, then why isn't quadrupling — or even more — also permissible? The result is absurd — and thus could not have been what the Legislature intended. *E.g., Churchill Realty Trust v. City of Dover Zoning Bd. of Adjust.*, 156 N.H. 668, 676 (2008). The standard is "reasonable costs to consumers" — not "whatever costs to consumers." And when the Legislature established the "reasonable costs" standard, it had a specific amount in mind — one that would "**not exceed**" $250 million in 2013 dollars. [Emphasis in original.]

B. Installation of Scrubber Technology Requires Approval under RSA 369-B:3-a

The actual statutory "mandate" to install scrubber technology is not contained in RSA 125-O:11 ("Statement of Purpose and Findings"), but in RSA 125-O:13 ("Compliance"). Its ¶1 provides:

> The owner **shall install** and have operational scrubber technology to control mercury emissions at Merrimack Units 1 and 2 no later than **July 1, 2013**. The achievement of this **requirement** is **contingent** upon obtaining **all necessary permits and approvals** from federal, state, and local **regulatory agencies** and bodies; however, **all** such regulatory agencies and bodies are **encouraged** to give **due consideration** to the general court's finding that the installation and operation of scrubber technology at Merrimack Station is in the **public interest**. The owner **shall** make appropriate initial filings with the department [of environmental services] and the **public utilities commission**, if applicable, and with any other applicable regulatory agency or body in a timely manner. [App. 9-10 (emphasis added).]

The "mandate" to install appears in the very first sentence of §13. But as the Commercial Ratepayers said in their Opening Brief (at 9):

> Significantly, however, the requirement is not absolute. The very next sentence of §13 makes it explicitly clear that "this requirement is **contingent** upon obtaining **all necessary permits and approvals**" (emphasis added) from government agencies. This "contingent" reference alone is conclusive evidence that the Legislature did not

intend that PSNH receive an "automatic pass" on the issue of "public interest."

One such necessary approval arises under RSA 369-B:3-a, which provides:

> The sale of PSNH fossil and hydro generation assets shall not take place before April 30, 2006. Notwithstanding RSA 374:30, subsequent to April 30, 2006, PSNH may divest its generation assets if the commission finds that it is in the economic interest of retail customers of PSNH to do so, and provides for the cost recovery of such divestiture. **Prior** to any **divestiture** of its generation assets, PSNH **may modify** or retire such generation assets **if the commission finds that it is in the public interest of retail customers of PSNH to do so**, and provides for the **cost recovery of such modification** or retirement. [App. 26 (emphasis added).]

PSNH argues, however, (at 25-27) that PUC approval under RSA 369-B:3-a is not a "necessary" approval under RSA 125-O:13. Significantly, however, the Legislature did not say that — though it easily could have. Indeed, note what the Legislature in fact said in the final sentence of §13, I: "The owner **shall** make appropriate initial filings with the department [of environmental services] and the **public utilities commission**, if applicable, within one year of the effective date of this section, and with any other applicable regulatory agency or body in a timely manner."[1] App. 9-10 (emphasis added). This would have been the perfect place for the Legislature to say that approval by the PUC under RSA 369-B:3-a is **not** "applicable" or **not** "necessary." Yet it said no such thing. PSNH's argument thus runs afoul of this principle of statutory construction: "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Lambert v. Belknap County Convention*, 157 N.H. 375, 378 (2008).

PSNH also argues (at 28) that "the last sentence of RSA 125-O:18 demonstrates that the Legislature did not intend for [the PUC] to review the costs of the Project under RSA 369-B:3-a." In its entirety, RSA 125-O:18 provides:

> If the owner is a regulated utility, the owner shall be allowed to recover all prudent

[1] Had PSNH filed with the PUC under RSA 369-B:3-a "within one year of the effective date" of RSA 125-O:13 — i.e., by June 8, 2007 — the history of the scrubber-technology issue might have evolved significantly differently.

> costs of complying with the requirements of this subdivision in a manner approved by the public utilities commission. During ownership and operation by the regulated utility, such costs shall be recovered via the utility's default service charge. In the event of divestiture of affected sources by the regulated utility, such divestiture and recovery of costs shall be governed by the provisions of RSA 369-B:3-a. [App. 13.]

PSNH's argument fails for at least two reasons. *First*, it sounds in repeal by implication. Andt "[i]n this state the climate for repeal by implication is frosty and inhospitable. The law does not favor repeal by implication if any other reasonable construction may avoid it." *Opinion of the Justices*, 107 N.H. 325, 328 (1966) (internal quotation marks omitted). Such a construction is offered herein and in the Commercial Ratepayers' Opening Brief (*n.b.*, p. 14 thereof).

Second, PSNH reads too much into RSA 125-O:18. *Lambert*, 157 N.H. at 378. Obviously, the last sentence applies to divestiture and related costs, and refers specifically to RSA 369-B:3-a (quoted at 7, above). That the first sentence is framed more generally, however, only makes sense – because it relates to two other types of costs, one of which is covered by RSA 369-B:3-a, and one of which is not. As to the type that **is** covered by RSA 369-B:3-a (besides divestiture-related costs), it is the **initial** costs associated with the modification of the asset — i.e., **construction** costs. As to the type that is **not** covered by RSA 36 9-B:3-a, it is the **subsequent** costs of **operation**. *See* RSA 125-O:13, I. These operational costs would instead be covered by RSA 125-O:18 or other statutes.[2]

What this Court held in *Appeal of Pinetree Power, Inc.*, 152 N.H. 92 (2005) is instructive:

> When finalized, SB 170 provided that the *divestiture* of PSNH generation assets may occur only "if the [PUC] finds that it is in the *economic* interest of retail customers of PSNH to do so...." RSA 369-B:3-a (emphasis added). The standard of review for a generating station *modification* was amended to read: "PSNH may modify or retire such generation assets if the [PUC] finds that it is in the *public* interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement." *Id.* (emphasis added). Thus, whereas divestiture of PSNH's generating assets after 2006 will require an analysis of the economic interests of customers, modifications to PSNH's generation assets require an analysis of the

[2] *See, e.g.,* RSA ch. 378 (Rates and Charges) and RSA 374:2 (just and reasonable charges by public utility).

> public interest of its retail customers. *See id.* By the plain language of the statute, the public interest standard for modification is broader than just economic interests. [At 97 (italics in original).]

In other words, cost recovery related to **divestiture** (covered by the final sentence of RSA 125-O:18) is confined to the **economic** interest of retail customers, whereas cost recovery related to **modification** implicates the **public** interest of retail customers.

C. No "Preemptive" Finding of "Public Interest" under RSA 125-O:11-18

PSNH argues (at 26) that the Legislature's finding of public interest is "preemptive." Again, however, the Legislature did not say that — neither in §13 nor elsewhere. Nor can PSNH's argument be squared with what the Legislature actually did say in §13. As the Commercial Ratepayers said in their Opening Brief (at 9-10):

> By "encourag[ing]" regulatory bodies to give "due consideration" to the Legislature's finding of "public interest," §13 also makes it clear that those regulatory bodies **retain** the authority to make a related decision. Significantly, §13 does **not** say that those regulatory bodies "shall **adopt**" or "shall **defer to**" the Legislature's finding of "public interest." Nor does it even say that they "**shall** give due consideration" to that finding. Rather, it merely says that they "are **encouraged** to give [such] due consideration." [Emphasis in original.]
>
> Furthermore, it would be fair to infer that the Legislature also contemplated that regulatory bodies would take into account the **circumstances** under which the Legislature made its own finding. One such circumstance, of course, is the fact that the finding was made based in part on information from PSNH and DES that the cost would not exceed $250 million in 2013 dollars. [Emphasis in original.]

D. No "Negating" of RSA 369-B:3-a by RSA 125-O:13, IX

PSNH points (at 28-29) to ¶IX of §13, which provides:

> The owner [PSNH] shall report by June 30, 2007 and annually thereafter to the legislative oversight committee on electric utility restructuring, established under RSA 374-F:5 [and the chairpersons of certain House and Senate Committees] on the progress and status of complying with the requirements of paragraphs I and III, relative to achieving early reductions in mercury emissions and also installing and operating the scrubber technology including any updated cost information.

PSNH thereupon contends that the reference to "any updated cost information" indicates an

intent to "negate" RSA 369-B:3-a. But such a "negating" would be repeal by implication, which, again, is strongly disfavored. *Opinion of the Justices*, 107 N.H. at 328.

Additionally, note what TransCanada Hydro Northeast Inc. says in its *amicus curiae* brief:

> At the June 18, 2008 meeting of the Electric Oversight Committee established under RSA 374-F:5, PSNH reported on the status of mercury reductions at Merrimack Station. Despite the fact that it is required by RSA 125-O:13, IX to provide "updated cost information" to the Committee, at that meeting PSNH did not present any information on costs, nor did it provide any indication that the costs for the installation of the scrubbers had escalated over original estimates. Although the Commission cited the reporting requirement as indicating "the legislative intent to retain for itself duties that it would otherwise expect the Commission to fulfill," clearly the Oversight Committee is not fulfilling that responsibility, and PSNH is not complying with its obligations to the Committee. [At 7, n. 4.]

CONCLUSION

For the foregoing reasons, the Commercial Ratepayers respectfully submit that the PUC's decision should be reversed, and the case should be remanded as requested in their Opening Brief.

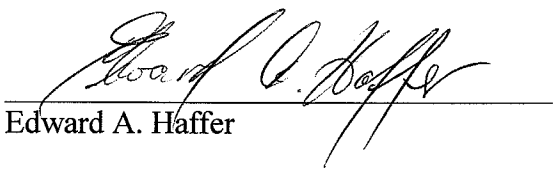
Respectfully submitted,
Stonyfield Farm, Inc., H & L Instruments, LLC, and
Great American Dining, Inc.,
By their attorneys,
Sheehan Phinney Bass & Green, P.A.

Dated: June 8, 2009

By: 
Edward A. Haffer, NH Bar No. 1052
1000 Elm Street, P.O. Box 3701
Manchester, NH 03105-3701
T: 603-627-8115

CERTIFICATE OF SERVICE

I certify that two copies of the foregoing have been mailed this date to the attached Service List.


Edward A. Haffer

SERVICE LIST

Robert Bersak, Esq.
PSNH
780 N Commercial St
PO Box 330
Manchester NH 03105-0330

Wilbur A. Glahn, III, Esq.
Mark C. Rouvalis, Esq.
McLane, Graf, Raulerson &
Middleton, P.A.
900 Elm St.
P.O. Box 326
Manchester, NH 03105-0326

Robert A. Backus, Esq.
Backus, Myer and Solomon
P.O. Box 516
Manchester, NH 03105

Arthur B. Cunningham, Esq.
P.O. Box 511
Hopkinton, NH 03229

Meredith A. Hatfield, Esq.
Office of Consumer Advocate
21 South Fruit St Ste 18
Concord NH 03301

Melissa Hoffer, Esq.
Conservation Law Foundation
27 N Main St
Concord NH 03302

Kristine E. Kraushaar, Esq.
Conservation Law Foundation
27 N Main St
Concord NH 03301-4930

Douglas Patch, Esq.
Orr & Reno, P.A.
PO Box 3550
Concord, NH 03302

Ronald J. Lajoie, Esq.
Wadleigh, Starr & Peters, PLLC
95 Market St.
Manchester, NH 03101

Office of the Attorney General
33 Capitol St.
Concord, NH 03301-6397